

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 94-664-T - ORDER NO. 96-70 ✓

JANUARY 26, 1996

IN RE: Request of The Great American Trolley) ORDER DENYING
Co., Inc., 350 Wesley Street, Suite) PETITION FOR
904, Myrtle Beach, SC 29577 (Mailing) REHEARING OR
Address - 821 Shunpike Road, North Cape) RECONSIDERATION
May, NJ 08204), to Amend Class A)
Certificate No. 1269.)

This matter comes before the Public Service Commission of South Carolina ("the Commission") on the December 22, 1995 Petition for Rehearing or Reconsideration ("the Petition") of this Commission's Order No. 95-1580 which approved the Application of The Great American Trolley Co., Inc. ("Great American") to amend its Class A Certificate of Public Convenience and Necessity No. 1269. The Petition was filed by Coastal Rapid Public Transit Authority ("CRPTA") and was received by the Commission on December 27, 1995.

In Order No. 95-1580, the Commission found Great American to be fit, willing, and able to provide the services for which it sought authority. The Commission further concluded that the public convenience and necessity were not being served by existing services in the area. By its Petition, CRPTA submits that the Commission should reconsider its decision and alleges several errors in the Commission's findings of fact and in the

Commission's conclusions of law.

CRPTA'S ALLEGED ERRORS IN THE COMMISSION'S FINDINGS OF FACT

1. CRPTA alleges error by the Commission in finding Great American fit, willing, and able to perform the proposed service. CRPTA alleges that the Commission's finding is in error because "Great American provided very little information or detail as to Great American's equipment, finances, personnel or operations." Petition, p. 12. In making a determination on "fit, willing and able," the Commission is guided by the standards set forth in 26 S.C. Code Ann. Regs. 103-133 (Supp.1995). Reg. 103-133 establishes the criteria which the Commission should use in determining whether an applicant for motor carrier authority is "fit, willing, and able."

In the determination of "fit," 26 S.C. Code Ann. Regs. 103-133 provides that the applicant must show that the applicant has a satisfactory safety rating, must certify that the applicant has no outstanding judgments pending against it, and must certify that the applicant is familiar with and agrees to operate in compliance with the statutes and regulations governing for-hire motor carrier operations in South Carolina. To demonstrate "able," the applicant must show that he has arranged by purchase, lease, or otherwise for the equipment to provide the service for which he is applying and should also provide evidence of insurance. 26 S.C. Code Ann. Regs. 103-133 (Supp.1995) provides that after meeting the requirements of fit and able, "willing" may be demonstrated by the submission of the application.

In the instant case, the witness for the Applicant testified about the requirements contained in 26 S.C. Code Ann. Regs. 103-133 (Supp.1995). Mr. Marsi answered questions regarding the equipment and personnel that Great American has in the Myrtle Beach area, about Great American's safety rating and safety inspection, and about Great American's insurance. Mr. Marsi also stated that Great American would operate in compliance with the statutes, rules, and regulations governing for hire motor carrier operations in South Carolina. The Commission also notes that the Application filed by Great American (which is part of the record in this case) contains an insurance quote, an equipment list, and a certification that Great American will operate in compliance with statutes and rules and regulations for motor carriers. As the requirements set forth in 26 S.C. Code Ann. Regs. 103-133 (Supp.1995) have been met, the Commission finds no error in its determination that Great American is "fit, willing and able" to perform the services for which authority was sought.

CRPTA also alleges that "Great American has since discontinued all service on all approved routes, refuting its testimony as to 'fit, willing and able'." Petition, p. 12. Testimony from Mr. Marsi at the hearing indicated that Great American was providing its services from April or May into the month of November, which is the "tourist season" when the influx of tourists into the area calls for more services. The Commission finds no error in its decision that Great American is "fit, willing and able" to perform the transportation services

requested.

2. CRPTA next alleges that the Commission erred in finding that the public convenience and necessity are not being served by the existing services in the area. CRPTA argues that the testimony showed that CRPTA serves the needs of the public in the area and offers that Great American entered no significant evidence in rebuttal of this evidence. The Commission first notes that while a party has the right to offer rebuttal evidence that a party is not required to do so. In this case, Great American has the burden of showing that it is "fit, willing and able" to perform the services for which it seeks authority. Once Great American makes its showing as to "fit, willing and able," the burden then shifts to any Intervenor to show that the public convenience and necessity are currently being met. S.C. Code Ann. §58-23-330 (Supp.1995) provides that

an applicant applying ... to amend a certificate to operate as a motor vehicle common carrier may be approved upon a showing ... that the applicant is fit, willing and able to perform appropriately the proposed service. If an intervenor shows or if the commission determines that the public convenience and necessity is being served already, the commission may deny the application. (Emphasis added.)

In Anderson Armored Car Service v. Pubic Service Commission, 295 S.C. 148, 367 S.E.2d 444 (Ct.App.1988), the South Carolina Court of Appeals was called upon to interpret S.C. Code Ann. §58-23-330. In its opinion, the Court of Appeals stated:

[t]he statute permits the Commission to grant the certificate if the applicant shows it is fit, willing, and able to perform the proposed service. It goes on to provide the Commission may deny the application "if an intervenor shows or if the Commission determines

that the public convenience and necessity is already being served." (Emphasis added.)

If the adequacy of existing service to meet the public convenience and necessity is in issue, the quoted language plainly requires the intervenor to prove the affirmative; it does not remotely suggest the applicant must prove the negative. Nor does it shift the burden of showing public convenience and necessity to the applicant simply because someone has intervened to oppose the application.

Upon weighing the evidence presented at the hearing against the standard contained in S.C. Code Ann. §58-23-330 (Supp.1995), the Commission found that the public convenience and necessity were not being met. The Commission finds no error in its determination and denies rehearing or reconsideration on this allegation.

CRPTA'S ALLEGED ERRORS IN THE COMMISSION'S CONCLUSIONS OF LAW

1. CRPTA alleges that the Commission erred in finding Great American meets the requirements of a Class A motor carrier as defined by S.C. Code Ann. §58-23-220 (1976) because Great American is not operating on a fixed schedule but on a schedule determined financially advantageous by Great American's management. As stated above, the Commission is aware, based on the testimony of Mr. Marsi from the hearing, that Great American is operating during the "tourist season" from April or May into the month of November. The Commission also recognizes that Great American is operating over fixed routes and schedules during that time. The Commission believes that the evidence supports the determination that Great American is a Class A motor carrier and finds no error from which reconsideration or rehearing should be granted.

2. CRPTA again asserts error by the Commission in finding

that Great American is "fit, willing and able" to perform the requested services. CRPTA's basis for this allegation is premised on the Commission "concluding" that the mere filing of an application and Commission approval of a previous application by Great American establish willingness "in light of Great American's current abandonment of all approved route service in Horry County." Petition, p. 13. In Order No. 95-1580, the Commission noted that it had "previously found Great American fit, willing and able to provide motor carrier passenger service." Order No. 95-1580 (October 3, 1995), p. 9. The Commission also stated in Order No. 95-1580 that Great American had manifested its willingness to provide Class A service by submitting its Application.

As stated above, 26 S.C. Code Ann. Regs. 103-133 (Supp.1995) provides that "having met the requirements as to 'fit and able,' the submitting of the application for operating authority would be sufficient demonstration of the applicant's willingness ..." The Commission finds no error in its determination that Great American had met the requirement of willingness as Great American satisfied the requirement contained in 26 S.C. Code Ann. Regs. 103-133 (Supp.1995).

The Commission further discerns no error in noting that it had previously found Great American "fit, willing and able" in that the testimony at the hearing shows that at the time of the hearing, Great American was operating over other routes pursuant to certificates of public convenience and necessity. Further, the Commission does not view Great American's cessation of operations

for the winter months, or "off season," as an abandonment of service in that Great American's testimony at the hearing indicated that Great American was planning to operate during the "tourist season." The Commission finds no error on this point on which to grant rehearing or reconsideration.

3. CRPTA again alleges error in the Commission's finding that Great American is fit, willing and able to provide the requested service due to CRPTA's assertion that Great American's trolleys are not suitable for inclement weather. At the hearing, Mr. Marsi testified that the trolleys used by Great American have curtains which may be drawn or closed to keep out rain or inclement weather. Mr. Marsi also testified that the trolleys were a tourist attraction. As such, the Commission believes that potential riders may choose to ride the trolleys or not to ride the trolleys if the weather is a factor. Based on this allegation by CRPTA, the Commission finds no error in its determination that Great American is fit, willing and able to perform the proposed service as

4. CRPTA next asserts error by the Commission in the Commission's determination that the public convenience and necessity were not being met. CRPTA takes issue with the statement in Order No. 95-1580 where the Commission noted that "[a]lthough witnesses for the Intervenor CRPTA testified that CRPTA would be adversely affected by approval of the Application, not one witness could quantify how much CRPTA would be affected." Order No. 95-1580 (October 3, 1995), p. 10. CRPTA maintains that the Commission erred in that governing case law does not require an

exact quantification of the amount of damage an existing provider will suffer in order to meet its burden of showing that the public convenience and necessity are being met. Petition, p. 14.

The Commission is cognizant of Welch Moving and Storage Co. v. Public Service Commission, 301 S.C. 259, 391 S.E.2d 556 (1990) in which the South Carolina Supreme Court stated that "although detriment to the income of existing carriers is relevant, it is not determinative and 'should not in itself defeat an application for additional services'." Welch, supra. citing Greyhound Lines, Inc. v. S.C. Public Service Commission, 274 S.C. 161, 166, 262 S.E.2d 18, 21 (1980). The Commission is also aware that S.C. Code Ann. §58-23-220 (1976) provides, in part, that "... the existence of a railroad or other motor vehicle carrier in the territory sought to be served by the applicant shall not be considered by the Commission as good cause for refusing the application." The Commission also observed in Order No. 95-1580 that it "is cognizant that CRPTA is concerned that Great American's expansion in the Myrtle Beach area will adversely affect existing business." Order No. 95-1580, p. 10. With regard to the route requested by the instant Application, the Commission concluded, based on the entire record and not any single fact, that the public convenience and necessity are not being met. The Commission finds no error in its conclusion.

5. CRPTA maintains that the Commission erred in concluding that the public convenience and necessity outweigh any adverse impact which may occur to CRPTA. Petition, p. 14. CRPTA states in

its Petition that the Commission failed to consider the testimony that CRPTA meets the transportation needs of the elderly, disabled, and low income citizens, as well as the tourists.

The Commission is keenly aware, as set forth in Order No. 95-1580, that the determination of public convenience and necessity is a relative or elastic theory which requires a determination of the facts in each case in deciding whether the public convenience and necessity is being met. See, State v. Carolina Coach Company, 260 N.C. 43, 132 S.E.2d 249 (1963). In rebuttal testimony, Great American introduced a survey of its ridership over the four day period of August 18 - 22, 1995. See, Hearing Exhibit No. 10. The results of Great American's survey were admitted into evidence at the hearing. The results of Great American's survey indicate that the majority of those answering the survey were visitors (88%), that the majority of those surveyed wanted increased transportation services from Ocean Boulevard to the Waccamaw Outlet Park (84%), that the majority of those surveyed desired increased transportation service to the Fantasy Harbor Theatres (74%), and that a majority of those surveyed rode the trolley for both transportation and amusement (62%). Hearing Exhibit No. 10. The Commission also considered the study submitted by CRPTA and the testimony of witnesses for both sides. Clearly, different opinions exist as to whether the public convenience and necessity are being served in this area. The Commission's conclusion that the public convenience and necessity are not currently being served is based upon all of the evidence in the record and not on any one isolated

fact.

The Commission is also aware that it has the discretion to approve an Application even if the Commission determines that the public convenience and necessity are being met. S.C. Code Ann. §58-23-330 (Supp.1995) provides that "[i]f an intervenor shows or if the commission determines that the public convenience and necessity is being served already, the commission may deny the application. ..." (Emphasis added.) Clearly, the Commission has broad discretion in the granting of a certificate of a public convenience and necessity. Therefore, the Commission discerns no error in its determination in Order No. 95-1580 that the public convenience and necessity were not being served by the current services.

6. Finally, CRPTA assigns error to the Commission in concluding that "the public convenience and necessity are not already being served on the grounds that one of CRPTA's routes does not exactly duplicate the route applied for by Great American but requires a transfer." Petition, p. 15. In Order No. 95-1580, the Commission observed that a portion of the route requested in the Application by Great American was a more direct route than the route CRPTA is currently operating. The fact that the routes are not identical was not the determining factor in the Commission's decision that the public convenience and necessity were not being met by existing services. As stated above, the Commission's determination that the public convenience and necessity are not currently being served is based upon all of the evidence in the

record and not on any one isolated fact. The Commission weighed all the testimony and evidence, including inter alia the testimony regarding increased growth and development in the Myrtle Beach area as well as the studies presented by CRPTA and Great American, in reaching its conclusion. The Commission finds no error in its conclusion.

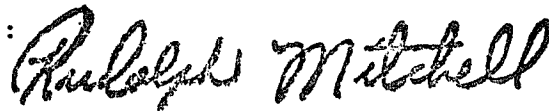
The Commission has examined the Petition for Rehearing or Reconsideration filed by CRPTA in whole and in its component parts and finds no error on which to grant rehearing or reconsideration.

IT IS THEREFORE ORDERED THAT:

1. The Petition for Rehearing or Reconsideration filed by CRPTA is denied.


2. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:



Chairman

ATTEST:



Deputy Executive Director

(SEAL)